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Military Justice in Ukraine: Past Experience and Current Challenges

Since 2014, after the beginning of the armed aggression of the Russian Federation in the south and east of Ukraine, the issue of reforming the country's military justice system has been increasingly raised among the political and expert communities [1]. This idea has also been supported by lawmakers who have repeatedly attempted to reform the current structure of the bodies responsible for the prevention, detection, termination, and disclosure of military criminal[2] and administrative[3] offences committed by military personnel.

The topic of military justice has become most relevant as the number of military personnel increased after the full-scale invasion by the Russian Federation on 24 February 2022, which, in turn, provoked a significant increase in military offences. In 2013, the Armed Forces of Ukraine (AFU) numbered 166,000 people; since the beginning of Russia's aggression in 2014, the force size has increased, reaching about 250,000 people by 2018. As of the beginning of 2024, according to the President of Ukraine, the Armed Forces consisted of about 880,000 military personnel. Meanwhile, according to the Office of the Prosecutor General, in 2021, the State Bureau of Investigation (a pre-trial investigation body with jurisdiction over military criminal offences) registered 2,980 criminal proceedings for military criminal offences; in 2022 - 13,583 cases, and in 2023 - 28,285 cases (including 16,316 offences related to unauthorised leaving of a military unit or place of service; 7,755 cases for desertion).

The debate on the feasibility of restoring the military justice system in Ukraine through reforming existing institutions or establishing new ones is still ongoing and is accompanied by several contradictory opinions.

Military Police

[1] **Military justice** is a complex of interconnected bodies (military police, military prosecutor's office, military courts, and military legal services) that perform law enforcement and judicial functions and are regulated by the norms of special legislation.
[2] **Military criminal offenses** are violations specified in the Criminal Code of Ukraine, criminal offenses against the established legislative procedures of military service, committed by military personnel, as well as conscripts and reservists during training.
[3] **Military administrative offenses** are administrative offenses specified in Chapter 13-B of the Code of Ukraine on Administrative Offenses.

Unlike other countries, Ukraine has no separate military police institution. Investigations of military offences and offences committed by military personnel are generally conducted by the investigative bodies of the State Bureau of Investigation, which has a staff of 1,600. The Security Service of Ukraine, the National Anti-Corruption Bureau of Ukraine, and the National Police of Ukraine also perform relevant functions depending on their jurisdiction and the specific nature of the offences.

Furthermore, since 2002, the Armed Forces of Ukraine have had a special law enforcement unit, the Military Law Enforcement Service (MLS). The servicemen of the MLS have sufficiently broad rights and powers to ensure law and order and military discipline among the servicemen of the AFU and other military formations. The governing bodies of the MLS exercise their powers in defined areas of activity covering the entire territory of the country, except for the temporarily occupied territories.

In 2015-2018, the Verkhovna Rada of Ukraine made repeated attempts to legislate the creation of a separate body to deal with the prevention and investigation of war crimes in the AFU. In different years, the Parliament considered draft laws such as “On Military Police,” “On the State Bureau of Military Justice" and others. At the same time, the possibility of expanding the powers of the MLS at the legislative level by granting it the right to conduct pre-trial investigations and operational and search activities was being considered. However, none of the legislative initiatives was supported due to internal contradictions and inconsistencies with the current legislation.

The year 2021 was marked by the approval of the Strategic Defence Bulletin of Ukraine, which outlines the reform of the MLS into the military police and, as a result, the achievement of compatibility of the military police with the relevant structures of NATO member states. Currently, the Verkhovna Rada is working on the next draft laws on the establishment of a separate law enforcement agency partially or fully based on the MLS, which will handle military offences and offences committed by military personnel, namely: “On the State Bureau of Military Justice” (Reg. No. 6569 of 28.01.2022) and “On Military Police” (Reg. No. 6569-1 of 15.02.2022). However, these draft laws are already facing criticism due to provisions that are somewhat outdated, resulting from the rapid changes in legislation, as well as ambiguity in approaches to the chosen regulatory models.

Military Prosecution

From 1992 to 2012, before the adoption of the new Criminal Procedure Code of Ukraine, the Military Prosecutor's Office functioned as a separate staffing unit within the prosecution system. The perceived lack of need for such an institution justified its dissolution at the time. Over the following two years, the newly created Main Department for Supervision over the Observance of Laws in the Military Sphere handled matters related to the observance of law and order in the military sphere. However, in 2014, following the onset of armed aggression by the Russian Federation and in connection with the anti-terrorist operation in the east of the country, a decision was made to reinstate the activities of military prosecutors.

From 2014 to 2020, the Military Prosecutor's Office functioned as a structural unit of the Prosecutor General’s Office of Ukraine. An essential feature of this unit was that in case of redeployment of military units and subdivisions of military formations to the area of the anti-terrorist operation, prosecutors from the relevant garrison military prosecutor's office were seconded to the areas where these formations and military units were located for the period of their assigned tasks. Military prosecutors were typically appointed as servicemen, but in some cases, by the decision of the Prosecutor General of Ukraine, civilians could also serve as prosecutors in this capacity.

In September 2019, the Verkhovna Rada of Ukraine adopted Law of Ukraine No. 113-IX “On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Service”, which once again dissolved military prosecutor's offices (the liquidation process itself lasted until the end of 2020). This time, the decision was justified by the impracticality of maintaining a large staff of prosecutors and investigators to handle a relatively

small number of war crimes, mostly related to unauthorized desertion of a military unit or place of service. Additionally, it was noted that military prosecutors performed functions not typical for them when investigating individual crimes and related corruption scandals. At the same time, the Law granted the Prosecutor General the right to establish specialized prosecutor's offices as a structural unit of the Office of the Prosecutor General, regional, and district prosecutor's offices, if necessary. Taking advantage of this provision, the Prosecutor General, by decision, established a specialized defence prosecutor's office, which is currently responsible for maintaining law and order in the military sphere. The prosecutors of the specialized prosecutor's office are civilians.

It should be noted that in 2009, the Venice Commission criticized the Ukrainian complex structure of the military prosecution service for its adherence to the typical Soviet approach[4], while in 2012, it supported the abolition of the military prosecution system to simplify Ukraine's prosecution system as a whole[5]. The Council of Europe's Directorate General for Human Rights and Rule of Law, in its opinion on the Law of Ukraine dated 14.10.2014, "On the Public Prosecutor's Office", and specifically noted that the expected subordination of military prosecutors to the general military hierarchy and military command would significantly undermine their independence and impartiality[6].

Despite all the arguments, in April 2022, through the adoption of the Law of Ukraine 'On Amendments to Certain Laws of Ukraine on Improving the Activities of Prosecutors in the Context of Armed Aggression against Ukraine' (draft law registered in the Verkhovna Rada of Ukraine on 16.02.2022 No. 7058), parliamentarians once again attempted to restore the possibility of appointing military personnel of the Armed Forces of Ukraine as prosecutors. However, the act itself was never signed by the President of Ukraine. In his opinion, it failed to take into account the tasks assigned to the AFU by the Constitution of Ukraine and the nature and essence of military service.

As of today, the Verkhovna Rada of Ukraine is considering two almost identical draft laws (Reg. No. 7576 of 21.07.2022 and No. 7576-1 of 05.08.2022), both aimed at regulating the possibility of appointing members of the Armed Forces of Ukraine to certain positions in the prosecution bodies.

Military Courts

Military courts in Ukraine have had their place in the judicial system since the declaration of independence until September 2010. During that period, the system of military courts included regional military courts, naval and garrison courts, and the Military Judicial Collegium of the Supreme Court of Ukraine. These courts were tasked with administering justice in the Armed Forces and other military formations. The judges of military courts were in military service and were part of the regular staff of the Armed Forces of Ukraine.

The dissolution of military courts in 2010, according to then-President of Ukraine Viktor Yanukovych, was motivated by the economic impracticality of their maintenance. The number of cases under the jurisdiction of such courts had significantly decreased due to a sharp reduction in the number of the AFU[7]. An additional argument was also presented, emphasizing the desire to align the Ukrainian justice system with European standards.

The issue of restoring military courts in Ukraine's judicial system has once again become relevant after the invasion of the Russian Federation. In 2018, the Verkhovna Rada of Ukraine of the VIII convocation considered several draft laws (Reg. No. 8392 of 22.05.2018 and No. 8392-1 of 01.06.2018) on the restoration of military courts in the system of general judicial proceedings. These courts would be responsible for conducting judicial proceedings in the

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[4] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)048-ukr
[5] https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)019-e
[6] https://rm.coe.int/1680245ffb
[7] 780,000 servicemen in 1992 versus 150,000 at the end of 2010.

Armed Forces of Ukraine and other military formations established per the law. The Main Scientific and Expert Department of the Verkhovna Rada of Ukraine (MSED) supported the idea of restoring the relevant courts in its conclusions on the above draft laws. However, due to the early termination of the Parliament's powers in 2019, the relevant draft laws were withdrawn.

In November 2023, the Verkhovna Rada of Ukraine submitted Draft Law No. 10301 “On Amendments to the Law of Ukraine ‘On the Judiciary and the Status of Judges’ on the Introduction of Specialisation of Judges in Military Criminal Offences, Criminal Offences against Peace, Human Security and International Law and Order.” Unlike previous legislative initiatives, draft law No. 10301 does not propose re-establishing military courts but only to introduce specialisation of judges in criminal proceedings in cases of military criminal offenses, criminal offenses against peace, human security and international law and order in local general and appellate courts. Already at the initial stage of the draft law, the MSED, in its conclusion, agreed with the arguments of the initiator of the draft law that this form of specialisation of judges does not cause controversy in terms of compliance with the Constitution of Ukraine, and is less economically, organisationally, technically and time-consuming, which is very important for a state that is already in a state of countering large-scale military aggression.

Military Legal Services

According to international practice, military attorneys are often part of the armed forces, staffed by officers with special military legal training and subject to the hierarchical military command system. A military attorney works exclusively with military personnel and can represent them in civil and criminal cases (as observed in the United States of America)

This practice is unacceptable in Ukraine due to several legislative obstacles. Firstly, in Ukraine, law practice specialization is not strictly mandated at the legislative level. An attorney has the right to represent a client's interests in any area of legal relations, subject to the principle of competence. Secondly, the Law of Ukraine “On the Bar and Practice of Law” explicitly states that law practice is incompatible with military or alternative (non-military) service. If entering the relevant service, the attorney must cease law practice.

In contrast to examples from other countries, Ukrainian military personnel are currently not entitled to free legal aid as a separate subject. However, suppose they belong to other categories of persons defined in Article 14 of the Law of Ukraine “On Free Legal Aid”. In that case, a military serviceman can use the services of attorneys or lawyers working at free legal aid centres.

At the same time, being aware of the challenges faced by servicemen, Ukraine has found a way to ensure the protection of the rights of Ukrainian defenders. At the initiative of the Commander-in-Chief of the Armed Forces of Ukraine in 2022, the volunteer association “Lawyers of the Armed Forces of Ukraine”[8] was established to provide legal support to Ukraine's defenders.

The Ukrainian experience of the functioning of the military justice system throughout the country's independence is characterized by a certain cyclical nature of processes - the elimination and restoration of some aspects of such a system. However, after the full-scale invasion, the issue of the existence of an effective, systematically verified military justice system in Ukraine has become even more relevant.

Given Ukraine's European integration and Euro-Atlantic aspirations, there is a need for a thorough analysis of the most successful examples of military justice in foreign countries, mainly NATO member states. The practice of such countries is vital from the point of view of time-tested experience to consider its results when developing amendments to Ukrainian legislation.

[8] https://pravo-ua.com/

Instead, Ukraine's military experience can provide an impetus for foreign countries, where the military justice system has been operating for decades, to review their own approaches in this area.

About this update on Ukraine's Verkhovna Rada

Ukraine's democratically elected officials continue to perform their duties while enduring Russia's unprovoked and horrific invasion. These briefing notes provide the latest information about the legislative activities of the Verkhovna Rada.

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